No. 288. 75
Brf. of Defendant for Rehearing

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BRIEF OF DEFENDANT.

Filed April 7, 1902.

Supreme Court of the United States

October Term 1901.

No. 288.

THE OSHKOSH WATER WORKS COMPANY,

PLAINTIFF IN ERROR.

vs.

THE CITY OF OSHKOSH.

In Error to the Supreme Court of the State of Wisconsin.

Supreme Court of the United States

October Term 1901.

No. 288.

THE OSHKOSH WATER WORKS COMPANY,
Plaintiff in Error,

vs.

THE CITY OF OSHKOSH.

In Error to the Supreme Court of the State of Wisconsin.

BRIEF OF DEFENDANT.

CASE.

The complaint, which contains two causes of action, is to recover $4,055.00 hydrant rentals, due October 1st, 1898, under contract made June 18th, 1883. (First cause of action record p. 9, 10, 11.) And the further sum of $1,060.00 for hydrant rental due October 1st, 1898, under contract entered into in August 31st, 1891. (Second cause of action, (record p. 11, 12.)

DEMURRER TO COMPLAINT.

That court has no jurisdiction of the person or subject matter; that the complaint does not state facts sufficient to constitute a cause of action. (Record p. 13.)

RESULT.

Demurrer sustained trial Court, decision affirmed by Wisconsin Supreme Court. (Record p. 14 and 16, 26.)

FORMER CHARTER.

In 1883, when the contract mentioned in first cause of action was

entered into, the City of Oshkosh, operated and existed under a Charter known as Chapter 183, P. and L. Laws of Wisconsin, 1883, the first section of which constituted it a municipal corporation by the name of the City of Oshkosh, and by that name capable of suing and being sued in all courts of law and equity.

It was therein provided, by Section 1, Chapter VII, "All moneys, credits and demands belonging to the city and wards of Oshkosh shall be deposited with and kept by the City Treasurer and shall be under the control of the Common Council and shall be drawn out only upon the order of the Mayor and City Clerk duly authorized by vote of the Common Council" and by Section 10, Chapter VII.

"Any account or demand against the City, before acted upon or paid, the Council may require the same to be verified by affidavit, except salaries and the amounts previously fixed or determined by law."

PRESENT CHARTER.

(In March, 1891, the former city charter of 1883 was superseded by Chapter 59, P. & L. Laws of Wisconsin, 1891, the same being the present Charter,) the first section of which constituted defendant a municipal corporation by the name of the City of Oshkosh, and by that name capable of suing and being sued in all courts of law and equity, and it was therein provided by Section 2, Chapter VII,

"All funds in the City Treasury shall be under the control of the Common Council and shall be drawn out upon the order of the Mayor and Clerk, countersigned by the Comptroller and authorized by a vote of the Common Council", and by Section 4, Chapter XXI;

"No action shall be maintained by any person against the City upon any claim or demand until such person first shall have presented his claim or demand to the Common Council for allowance and the same shall have been disallowed in whole or in part; provided that failure of such Common Council to pass upon such claim within sixty days after the presentation of such claim shall be deemed a disallowance thereof;" and by section 5, Chapter XXI,

"The determination of the Common Council disallowing in whole or in part any claim shall be final and conclusive, and a bar to any

action in any court founded on such claim, unless an appeal be taken from the decision of such common council as in this act provided."

Section 6, Chapter XXI, provided for the appeal in case of disallowance in whole or in part, to be accomplished by serving a written notice of the appeal on the City Clerk within twenty days after the disallowance of the claim and by executing a bond to the city in the sum of $150.00, with two sureties to be approved by the City Attorney and Comptroller, conditioned for the faithful prosecution of the appeal and payment of costs, whereupon the clerk is required to transmit the decision and a brief statement of the proceedings and all papers to the clerk of the Circuit Court of the County where "*such case shall be entered, tried and determined in the same manner as cases originally commenced in said Court.*"

CLAIMS NOT DISPUTED.

The provisions of Charter of 1883, and Charter 1891, relating to the payment of claims, when the same are undisputed are similar.

It will be observed that where there is no dispute as to the claim or demand the provisions in regard to demand and payment out of the city treasury, only upon a vote of the Common Council are practically identical.

CLAIM DISPUTED.

It is only when the correctness of the claim is challenged, that any difference in the two charters is discovered, such difference being a modification of the procedure. In other words a change in the steps and proceedings necessary to give jurisdiction to the Court. *That is all.*

REMEDY.

Under the Charter of 1883, after demand, the Common Council had the right to require an affidavit of the correctness of the claim.

If claim remained unpaid, and claimant sought to enforce collection, the remedy, a suit at law *commenced by the service of a summons.* This gave the court jurisdiction.

Under the Charter of 1891, this proceeding was changed, *a notice of appeal* and bond for costs were substituted for the summons, permissible under charter of 1883. It is obvious that the charter of

1891 is only a change in the procedure, nothing more than a slight modification of the manner in which the court acquires jurisdiction of disputed claims.

This is the only change in the remedy, *in all other respects the laws of Wisconsin, relating to the enforcement of a contract liability remained the same.*

A proper notice of appeal and bond confers jurisdiction upon the Circuit Court, formerly a summons, duly served was sufficient.

I call particular attention to the fact that *after the court once acquires jurisdiction* the same proceedings are open to plaintiff as were at its command under the former charter, all the rights that formerly existed as to the procedure and final determination of the action are specifically preserved by the charter of 1891, it expressly says, "*such case shall be entered, tried and determined in the same manner as cases originally commenced in said court.*" (Section 6, Chapter XXI.)

It is only in the manner of conferring jurisdiction upon the court, of disputed claims, that the legislature has changed the remedy.

This change of procedure, provided by the amended or new charter of City of Oshkosh, it is claimed by plaintiff in error, in so far as the same relates to *the first cause of action* (contract of June 18th, 1883,) impairs the obligation of that contract, and therefor contravenes the provisions of the Constitution of the United States following, to-wit, "No State shall * * * pass any * * * law impairing the obligation of contracts."

There is no merit to this claim; the change complained of is a simple one, it is only in the mode of procedure, no right of plaintiff is taken away, an adequate and efficacious remedy is left.

There is a distinction but no difference between these remedies, one is as adequate as the other.

LAWS EFFECTING REMEDY.

"The right of a creditor to any particular remedy is not a vested right in the continuance of any special mode of procedure, on the perpetuation of any remedy or remedial process which can be modified or abolished with out impairing or taking away the right itself."

2 Beach, Modern Law Contracts, S. 1667. Bird vs. Keller, 77 Maine, 270. Chaffe vs. Aaron, 62 Miss., 29. Rich vs. Flanders, 39 N. H., 304.

"A particular remedy existing at the time of the making of a contract, may be abrogated altogether, without impairing the obligation of the contract, if another, and equally adequate remedy for the enforcement of that obligation remains, or is substituted for the one taken away."

2 Beach, Modern Law of Contracts, 1667. New Orleans, etc., Co., vs. State of Louisiana, 157, U. S., 219. Connecticut etc. Ins. Co. vs. Cushman, 108 U. S., 51. McGahey vs. Virginia, 135 U. S. 693.

It is the settled law that "over mere remedial procedure the power of the legislature is absolute; that laws regulating it involve so much the consideration of public convenience and welfare, that individuals cannot be conceded vested right therein"; that

"Changes of remedy for the enforcement of legal contracts will be valid even though the new remedy be less convenient than the old, or less prompt and speedy;" that

"It is the power of the legislature to amend, change or modify the laws governing proceedings in courts, both as to past and future contracts, if they leave the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made;" that

"The legislature may alter or vary existing remedies as they please, provided that in so doing their nature and extent is not so changed as materially to impair the rights and interests of the parties; that

"The legislature may enact a statute of limitations by which the remedy upon existing contracts, if not prosecuted within a specified time may be entirely defeated. So they may pass acts abolishing imprisonment for debts previously contracted, recording acts by which the older grant of real estate otherwise valid, is postponed and rendered void, as to a younger one, and other acts of similar nature; and yet such acts will be sustained as constitutional and binding;" that

"So far as the constitution of the United States, or of Wisconsin, reaches or effects the alterations of the remedy on contracts such alterations are matters of sound discretion with the legislature. It has the power within the limits of the constitution to control the remedy and to determine whether any change or modification of it is necessary, and what change, and whether parties to the contract are left with substantial remedy according to law, as it existed before the change, subject however to a final determination by the courts of the constitutionality of such modifications or changes."

Many cases can be found in the notes in the elementary treatise by me cited, sustaining the above propositions. These rules of law are clearly established.

Cooley's Constitutional Limitations, 285, 286 and cases in notes.

Beach on Modern Law of Contracts, 2nd addition, sections 1666, 1667, 1668, and cases in notes

Among the important cases in Wisconsin bearing upon this question are the following:

Lightfoot vs. Cole, 1 Wis., 26–33; Von Banbach vs. Bade, 9 Wis., 559; Starkweather vs Hawes, 10 Wis, 125; Cornell vs. Hitchens, 11 Wis, 368; Strenbell vs. Railway, 12 Wis., 67; Oatman vs. Bond, 15 Wis., 20; State ex rel Soutter vs. Madison, 15 Wis. 30; Paine vs. Woodwith, 15 Wis., 299; Hasbrouck vs. Shipman, 16 Wis., 296; Selsby vs. Redlon, 19 Wis., 17; Nelson vs. Roundtree, 23 Wis., 367; Sydnar vs. Palmer, 32 Wis., 406, 410; Northwestern Mutual Ins. Co. vs. Neeves, 46 Wis., 147; Lee vs. Buckheit, 49 Wis., 54; Rosenthal vs. Wehe, 58 Wis., 621; Hall vs. Banks, 79 Wis., 229; Second Ward Savings Bank vs. Schrank, 97 Wis., 450; Eau Claire Bank vs. Macanley, 101 Wis. 304; Penn. L. & C. Works vs. Union O. P. Co., 100 Wis. 488.

"It being determined that the remedy or laws for enforcement of a contract existing at the time it is made enter into it and form a part of its obligation, it might perhaps be supposed that any repeal, change or amendment of such remedy or laws which in any manner delayed or rendered the enforcement of the contract less complete and

effective would be unconstitutional and void; but such is not the case; all the authorities agree that it is within the power of the legislature to repeal, amend, change or modify the laws governing proceedings in courts, both as to past and future contracts, so that they leave the parties a substantial remedy according to the course of justice as it existed at the time the contract was made." Von Bambach vs. Bade, 9 Wis., 577.

The following from Bronson vs. Kinzie, 1 How., U. S., 311, "Although a new remedy may be deemed less convenient than the old and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. *Whatever belongs merely to the remedy may be altered according to the will of the state provided the alteration does not impair the obligation of the contract.* But if that effect is produced it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution," has been approved and adhered to by the Supreme Court of Wisconsin. Examination and comparison will show that the decisions of the Wisconsin Supreme Court are in harmony with the decisions of the United States Supreme Court, upon the proposition here presented.

The Supreme Court of the U. S. in McCullough vs. Virginia, 172 U. S., pages 102–124, has declared the rule to be as follows: "it is equally well settled that changes in the forms of actions and modes of proceedings do not amount to an impairment of the obligations of the contract *if any adequate and efficacious remedy be left.*"

Applying these principles of law to the question here presented we have but to inquire, the purpose and intent of the amendment to the City Charter (Law of 1891), and determine, whether it leaves the plaintiff an adequate remedy. In other words, does chapter 59, P. & L. laws of Wisconsin, 1891, provide an "adequate and efficacious remedy" for the enforcement of plaintiffs contract.

It has already been pointed out and is an undisputed fact, that claimant by presenting its claim to Common Council, if disallowed, can, by taking a proper appeal, prosecute the claim to final judgment in the same manner and under precisely the same rules of

pleading and practice as it could do if the action was commenced by summons.

A proper appeal is equivalent to a summons, the result the same, viz: Court acquires jurisdiction, after that practice and proceeding identical in either case including trial on merits and judgment.

Section 6, Chapter XXI. Ch. 59, Laws 1891.

The charter of 1891 does not deprive the plaintiff of an adequate remedy, but on the contrary provides one. It is a reasonable and substantial procedure for the enforcement of all contract obligations. It is only the substitution of another "equally adequate and efficacious" remedy. A remedy substantially equivalent to the ordinary action at law.

PLAINTIFF'S BRIEF.

SUB. I AND II.

No cases are cited that conflict with the law as claimed by the defendant. With the decisions of the Supreme Court of Wisconsin cited by plaintiff in error, regarding appeals to Circuit Court from action of Common Council in disallowing claims, I find no fault. None of those questions are here presented.

By those decisions plaintiff seeks to establish that the remedy provided by charter 1891 is not adequate, is not efficacious. In all those cases plaintiffs did not comply with the law. If they had, the court would have acquired jurisdiction. Those decisions are not here for review. The law is plain, and easy to comply with, the procedure as simple as the drawing of a summons.

A notice of appeal takes the place of a summons, it is served upon the clerk, instead of upon the mayor. When accompanied by a sufficient bond, the clerk makes return to Circuit Court, where the case is "entered, tried and determined" as though commenced by summons.

What right has been invaded here? Wherein does plaintiff suffer? Where is there "any minute detail," where any "tortuous filtering process," through the Common Council. I fail to see any just reason for complaint. In Railroad Company vs. Hecht, 95 U. S., page 168, held, "where charter of corporation required service of process

on its president, a subsequent statute authorizing service on other officers held not to impair the contract."

In Perkins vs. Watertown, 5 Biss. 320, held, Law authorizing service of process on mayor or clerk may be changed to require service on mayor without impairing obligation of contract.

It is urged, that the bond if not in compliance with the statute is not amendable, and if no new bond is furnished within the time, the court fails to acquire jurisdiction, these objections are too immaterial to receive serious consideration. In speaking of these objections the Supreme Court of Wisconsin in Oshkosh Water Works Company vs. City of Oshkosh, 109 Wis., page 223, says: "Some of these changes are too immaterial to require extended comment. Service of notice of appeal on the city clerk in lieu of summons on mayor is clearly so."

"Nor are we impressed with the importance of the asserted inability of a claimant to cure defects in procedure by amendment.

"It can hardly be said that there is any vested right to make mistakes, a variance of policy as to liberality in permitting amendment cannot be said to impair the obligation of any contract."

"The fact that a failure to obtain judgment by reason of errors in procedure or lack of proof which in ordinary practice would result only in non-suit, leaves claimant barred of his claim, no more effects the obligation than does a statute of limitations leaving reasonable time to sue, but expiring before the defectiveness of an attempted suit is discovered." Terry vs. Anderson, 95 U. S. 628; Koshkonong vs. Burton, 104 U. S. 668; Mitchel vs. Clark, 110 U. S. 633; Relyea vs. Tomahawk P. & P. Co., 102 Wis. 301.

"It certainly comes no nearer such obligation than does an act taking away one's right to a second trial as of course after a judgment in ejectment."

Snydor vs. Palmer, 32 Wis. 406.

Another objection urged is that a claim must be presented to Common Council and await its disallowance either by express action, or by non-action, which occurs in sixty days after presentation, during which time he has no right to sue.

"It will be observed that while unconstitutionality has been ascribed to legislation which directly postponed the ultimate acts for the enforcement of a contract right, as by staying execution or creating or extending period of redemption from judicial sales. (Barnitz vs. Beverly, 163 U. S. 118) No case has been cited to us, and none discovered, where reasonable delay resulting *incidentally from the requirement of certain new steps in procedure or from the enlargement of time for taking such steps*, has been held fatal, provided such legislation did not clearly appear to be in bad faith, and for the purpose of defeating or impairing the obligations of the contract. Oshkosh Water Works Company vs. City of Oshkosh, 109 Wis. 224.

Modifications of proceedings imposing either increased burdens or increased time, have been recognized as legitimate exercise of legislative power over remedies and procedure.

Von Bambach vs. Bade, 9 Wis., 559, Starkweather vs. Hawes, 10 Wis., 125; Lee vs. Buckheit, 49 Wis., 54. Relyea vs. Tomahawk, P. and P. Co., 102 Wis., 301. Vance vs. Vance, 108 U. S. 514. Clark vs. Martin, 49 Pa. St., 299.

In answer to the dissenting opinion of Justice Barden herein, Record p. 28, I quote the following from the opinion of the Court, rendered by Mr. Justice Dodge.

"The requirement that before invoking judicial action the claimant must submit his claim to consideration of the Common Council is not a serious burden upon him. *In practical affairs the instances are rare if not unknown, that a claimant commences suit until he has first invited payment without suit.* The effect of the charter of 1891, is to limit, not enlarge, the period necessary to constitute a demand and refusal of payment. In the matter of demands against municipalities the importance of momentary opportunity to sue is far less than with individual debtors, who during even a few days may by transfer of property or otherwise become execution proof, and thus defeat the purpose of an action."

The only remaining obstacle to judicial hearing and enforcement which appellant urged upon our attention is the requirement of a bond for costs in the sum of $150. This is in itself hardly a new

burden; for our practice statutes have since long prior to 1883, subjected plaintiffs to a security for costs, in the discretion of the court, in still larger amount. Independently of this view, however, the absolute requirement that a plaintiff shall furnish reasonable security for costs, as prerequisite to suit, cannot be considered so completely a denial of adequate remedy as to impair the obligation of existing contracts. It is a very usual requirement of practice statutes and rules. If our statutes were changed so that such a preliminary were absolutely required by law for all suits, instead of being permissibly required by the court as now, we apprehend there could be no doubt that such change is within the legitimate control of the legislature over procedure. Such is the suggestion in Oatman vs. Bond, 15 Wis., 20. But counsel urges that the bond is not amendable, and a mistake therein is fatal to the cause of action. The answer to this suggestion is that no mistake need be made. *The charter, in terms easy of comprehension, if carefully read, prescribes what the bond shall be, and compliance therewith is not difficult.* A law which lays out a plain and adequate course for one to secure judicial enforcement of his contract does not impair the obligation because one straying out of the prescribed path cannot reach the goal. But, again, counsel says the statutory requirement that the bond be approved by the city attorney and comptroller renders it possible for those officers, either wilfully or by neglect, to exclude him from his remedy in court. Whether this be so has not yet been decided. If an appellant files a good and sufficient bond in compliance with law, it is by no means certain that the courts cannot coerce proper action of such city officers, at least so far as is possible without invading the field of their discretion. But it is not an impairment of the obligation of a contract to make the remedy dependent for certain steps upon the performance by public officers of their duties.

The duty of the city attorney and comptroller to approve a proper bond is one cast on them by law, for breach of which one injured may have his remedy, as well as against the sheriff on whom he must depend for enforcement of an execution. All remedies depend upon performance of duty by public officers, and by breach thereof may fail. That is true even of the privilege of action in the courts,

wherein breach of duty by the judge might most effectually postpone or entirely defeat the claim; but such possibility does not render the remedy inadequate."

SUB. III.

WITHDRAWAL OF PROPERTY FROM EXECUTION.

It is claimed that property is withdrawn from execution, that under charter of 1883, judgment could be rendered on non-payment and execution could be had on which all property of the city not exempt could be seized and sold.

In regard to enforcing the collection of a judgment obtained against the city, the law remained the same after the amendment of 1891.

On examination of the 1883 charter provisions, cited in brief of plaintiff. I find equivalent provisions in the charter of 1891. The provisions of both charters are quoted in full.

OLD CITY CHARTER.	PRESENT CITY CHARTER.
Chapter 183, Laws of 1883.	Chapter 159, Laws of 1891.
Sec. 19, Sub Chapter XIV.	Sec. 31, Sub Chapter XXIII.
"No real or personal property of any inhabitant of said city, or of any individual or corporation, shall be levied on and sold by virtue of any execution issued to satisfy or collect any debt, obligation or contract of said city."	"No real or personal property of any inhabitant of said city, or of any individual or corporation thereof, shall be levied on and sold by virtue of an attachment or execution issued to satisfy or collect any debt, obligation or contract of said city; nor shall any person or corporation be held liable as garnishee of said city."
Sec. 23, Sub Chapter XIV.	Sec. 34, Sub Chapter XXIII.
"The said city may lease, purchase and hold real or personal estate sufficient for the convenience of the inhabitants thereof, and may sell and convey the same, and they shall be free from	"The said city may lease, purchase and hold real estate or personal estate sufficient for the convenience of the inhabitants thereof, and may sell and convey the same, and they shall be free from

taxation while owned by the city."

Sec. 28, Sub. Chapter XIV.

"When the city of Oshkosh deed or sell any real estate or any interest therein owned by said city the party of the first part shall be the city of Oshkosh, and the person or persons authorized to execute such deed or lease need not be named in the body thereof."

Sec. 29, Sub Chapter XIV.

"The Mayor of said city is hereby authorized, when the Common Council shall by ordinance or resolution for that purpose, describing the real estate and interest to be conveyed, order and direct him so to do, to execute a deed or lease of such real estate or interest therein belonging to said city, the said deed or lease shall be signed by the Mayor of said city and countersigned by the City Clerk, and sealed with the corporate seal of said city and duly entered and acknowleged as is provided by law for the execution of deeds and leases."

Sec. 30, Sub Chapter XIV.

"When any such deed or lease is so executed, the City Clerk shall attach to such deed or lease a true and attested copy of such ordinance or resolution and the same shall be recorded by the register of deed with the said

taxation while owned by the city."

Sec. 38, Sub Chapter XXIII.

"The Mayor and City Clerk of said city are hereby authorized, when the Common Council shall (by ordinance or resolution for that purpose, describing the real estate and interest to be conveyed) order and direct them to do so, to execute a deed or lease of such real estate or interest therein belonging to the said city, and the said deed or lease shall be signed by the Mayor and City Clerk, sealed with the corporate seal of said city, duly witnessed and acknowledged, as is provided by law for the execution of deeds and leases; provided, that all leases shall be countersigned by the comptroller."

Sec. 39, Sub Chapter XXIII.

"When any such deed or lease is so executed, the City Clerk shall attach to such deed or lease a true and attested copy of such ordinance or resolution, and the same shall be recorded by the register of deeds with the said

deed or lease, and each copy so attached and recorded shall be in all courts of the state prima facie evidence of the authority of such Mayor to make and execute such deed or lease."

deed or lease, and such copy so attached and recorded, shall be in all courts of this state, prima facie evidence of the authority of such Mayor to make and execute such deed or lease."

The Revised Statutes of Wisconsin 1878, Section 2982, Sub. 16, exempted virtually all the city property from execution.

This statute was in force at the time contract of plaintiff was entered into and has remained the law ever since.

Then as now the only recourse of a judgment creditor in collecting his judgment against a city was by mandamus to compel the levy of taxes, to pay the same.

The plaintiff says "no action can be brought upon an allowed claim so no judgment can be secured."

The claim when allowed, defacto, becomes a judgment.

A mandamus can be at once issued to levy tax to pay the allowed claim, equally and as promptly as upon a judgment.

Gutta Percha vs. Ashland, 100 Wis., 232.

An allowed claim draws interest same as a judgment.

GOOD FAITH OF THIS LEGISLATION.

That this legislation was adopted in absolute good faith, has never been questioned, and its only purpose was to regulate the remedy. Under the charter of 1883, the plaintiff could present his claim to the council, whether just or unjust he could do so to every successive council for six successive years, the city never knew whether he intended to enforce his claim by suit or not. If the Common Council which contracted the claim, had knowledge of any legal or equitable defense thereto, and accordingly, would refuse payment, claimant could abide his time, subject only to statute of limitation, and present the same again and again until a council and city officials were elected which, through inadvertance or lack of information would allow the claim, even if unjust, the claim could be held indefinitely and resurrected at such time in the future as would prove convenient, subject

only to statute of limitation. It could be called up when every officer or member of the council who had knowledge thereof had passed away.

The new legislation is to the effect that when claims presented to the Common Council are not allowed, plaintiff must commence his action by serving a proper notice of appeal and bond, so that the city may have knowledge, of a contest at a time when the facts and reasons for refusal of payment are known to the officers then administering the affairs of the city. Has not a city the right to know, within a reasonable time after it has disallowed a claim, whether or not its decision is final?

Our Supreme Court has in many cases particularly those cited by plaintiff, fully recognized, and emphasized the necessity and wisdom of this and parallel legislation.

In Seegar vs. Ashland, 101 Wis., 518, a conclusive reason was given for this change in legislation relating to enforcing money demands against municipalities. The Court says, "The purpose of this legislation is obvious, namely, that the public treasury shall be free from the peril of repeated solicitation of successive councils or other public officers by claimants. It is to protect not only against the persistent cupidity of claimants but against the yielding thereto of public officials.

"The legislature has deemed it necessary to throw these burdens upon the claimants and restrictions upon the municipal officers in order to protect the public moneys of the municipalty, and we can not review the wisdom nor impair the efficacy of its enactment were we at all inclined to do so."

SECOND CAUSE OF ACTION.

Error is claimed, in concluding as a matter of law that the contract of August 31st, 1891, (instead of October 1st, 1891, as stated in plaintiff's brief) for extension of mains was not constitutionally impaired by charter of 1891.

I call attention to the fact; this contract was a new contract, wholly independent of the other, by which the city was to locate a

hydrant every 528 feet on new or additional water mains to be laid as ordered and to pay $40.00 per hydrant per annum, payments to be made quarterly.

This contract was entered into August 31, 1891, (complaint, sub. IX, X, record, page 11.)

Chapter 183 of P. and L. Laws of Wisconsin, 1883, the former charter was not then in force.

The present charter, chapter 59, P. and L. Laws of Wisconsin, 1891, had been passed by the legislature and had already been in force since March 23rd, 1891, and for over five months had been the law.

Chapter 59, P. and L. Laws of Wisconsin, 1891. Published March 23rd, 1891.

The contract mentioned in the second cause of action having been entered into after the present charter had become the law, the second assignment of error is clearly frivolous. It was not even argued in the Court below, "The only assignment of error argued by appellant is that the Court erred in holding that the charter of the city of Oshkosh, chapter 59, laws of Wisconsin, did not, so far as it relates to the contract of June 18th, 1883, impair the obligation of the contract." (Record, p. 16.)

Appellant's brief in this Court, is silent as to second assignment of error. Certainly it cannot seriously be claimed that chapter 59, laws 1891, could effect the obligation of a contract which was not made until after such law had been in full force and effect for five months and more.

CONCLUSION.

This amended charter lays out a plain and adequate course for one to secure judicial enforcement of his contract, it is no more difficult to draw a notice of appeal and a bond, than it is to draw a summons.

How can it be said that the obligation of the contract is impaired?

How can it be said that no adequate remedy is left?

To arrive at such conclusion, the reasoning must of necessity be "tortuous."

Has a party, through his attorneys, a vested right to make mistakes, and because he may have failed to follow the directions of a plain law, to say that such a law, in consequence of mistakes by him made impairs the obligation of the contract he is seeking to enforce? I think that, the reasoning of Supreme Court of Wisconsin, "A law which lays out a plain and adequate course for one to secure judicial enforcement of his contract *does not impair the obligation because one straying out of the prescribed path cannot reach the goal*," also, "All remedies depend upon performance of duty by public officials and by breach thereof may fail. That is true even of the privilege of action in the courts wherein breach of duties by the judge, might most effectually postpone or entirely defeat the claim, but such possibility does not render the remedy inadequate," (record, p. 27,) meets all the objections, conjectures, presumptions, possibilities, and quibbles regarding possible action, caprice or misbehavior of city officials suggested by counsel for plaintiff. Especially is this true when there is an adequate remedy for any one who may sustain damage, by reason of a breach of the duty cast upon public officials by law.

That the change of legislative policy as to procedure upon claims against Oshkosh and many other cities, was adopted in the utmost good faith, with no legislative purpose other than promotion of public welfare and proper protection of public funds against unlawful demands cannot be doubted.

Putnam vs. Rubican, 32 Wis., 498; Seegar vs. Ashland, 101 Wis., 515.

This legislation did not change or defeat or impair the obligation of the city of Oshkosh to pay the hydrant rental, it did not destroy any right of plaintiff to enforce his claim in the courts.

It did not withdraw property of city from execution. *It made no change whatever between the city of Oshkosh and the Oshkosh Water Works Company so far as contract obligations were concerned.*

The city was not relieved from performing anything, which it obligated itself to do.

On the other hand it simply substituted a notice of appeal and bond in place of a summons. It provided a simple, plain, adequate proceeding, which is easy to comply with.

It slightly modified the procedure for commenment of action. It made a proper appeal a substantial equivalent to a summons. The notice of appeal and bond for costs being the commencement of suit instead of summons.

It left the practice and proceeding, including trial upon merits and judgment, and enforcement thereof the same.

I submit that within the meaning of the constitution of the United States, the remedy afforded by the charter of 1891, is, adequate, is efficacious, is in every way a substantial equivalent to the remedy afforded by charter of 1883.

Respectfully submitted,

JOHN F. KLUWIN,

City Attorney and Attorney for Defendant.

Supreme Court of the United States.

No. 75.—October Term, 1902.

The Oshkosh Waterworks Company, Plaintiff in Error, vs. The City of Oshkosh. } In error to the Supreme Court of the State of Wisconsin.

[January 5th 1903.]

Mr. Justice Harlan delivered the opinion of the Court.

This case presents a question under the clause of the Constitution of the United States which prohibits a State from passing a law impairing the obligation of contracts.

The question arose upon demurrer by the defendant, the city of Oshkosh, to the complaint filed against it on the 16th day of June 1900 by the Oshkosh Waterworks Company, a municipal corporation of Wisconsin. The principal ground of demurrer was that the complaint did not state facts sufficient to constitute a cause of action.

The complaint set forth two causes of action, on the first one of which the company claimed a judgment for $4,085, which was alleged to be due from the city under an agreement made between it and the company on June 18th 1883 in reference to the building and maintaining by the company of a waterworks plant for supplying water for domestic and fire purposes, and the renting of public fire hydrants.

On the second cause of action the company asked a judgment for $1,060, which amount was claimed under an agreement of the 31st day of August 1891 having reference to the company's extensions of its then existing mains, and the rentals to be paid by the city for hydrants to be located on such extensions.

After the contract of 1883 was made the charter of the city was amended and revised—the revision taking effect March 23d 1891. The revised charter contained certain provisions as to suits against the city, imposing on suitors conditions or restrictions that did not previously exist.

The company insisted that the revised charter could not be applied to this suit without impairing the obligation of its contracts with the city. This view was rejected by the State court, the demurrer was sustained and the suit dismissed.

The general principles which must control in determining whether a State enactment impairs the obligation of contracts have become so firmly established by the decisions of this court that any further discussion of

their soundness would be inappropriate. It is only necessary to recall them, and then ascertain their applicability to the particular State legislation now alleged to be repugnant to the Constitution of the United States.

It is well settled that while, in a general sense, the laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing. It is true the Legislature may not withdraw all remedies, and thus, in effect, destroy the contract; nor may it impose such new restrictions or conditions as would materially delay or embarrass the enforcement of rights under the contract according to the usual course of justice as established when the contract was made. Neither could be done without impairing the obligation of the contract. But it is equally well settled that the Legislature may modify or change existing remedies or prescribe new modes of procedure, without impairing the obligation of contracts, provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract. *Green* v. *Biddle*, 8 *Wheat.* 1, 85; *Bronson* v. *Kinzie*, 1 *How.* 311, 317; *Planters' Bank* v. *Sharp*, 6 *How.* 301, 327; *Walker* v. *Whitehead*, 16 *Wall.* 314, 317; *Murray* v. *Charleston*, 96 *U. S.* 432, 438; *Edwards* v. *Kearzey*, 96 *U. S.* 595, 601; *Vance* v. *Vance*, 108 *U. S.* 514, 518; *McGahey* v. *Virginia*, 135 *U. S.* 685, 693; *Barnitz* v. *Beverly*, 163 *U. S.* 118; *McCullough* v. *Virginia*, 172 *U. S.* 102, 104. The decisions of the Supreme Court of Wisconsin as to what are to be deemed laws impairing the obligations of contracts are in harmony with the decisions of this court. *Lightfoot* v. *Cole*, 1 *Wis.* 26, 34; *Von Baumbach* v. *Bade*, 9 *Wis.* 559; *Pame* v. *Woodworth*, 15 *Wis.* 298; *Northwestern Mut. Ins. Co.* v. *Neeves*, 46 *Wis.* 147; *Lee* v. *Buckheit*, 49 *Wis.* 54; *Rosenthal* v. *Wehe*, 58 *Wis.* 621.

Having these principles in view, we proceed to inquire whether the revised charter of Oshkosh so changed existing remedies for the enforcement of contract rights against municipal corporations as to impair the obligation of the contract made in 1883 between the Waterworks Company and the city.

By the act of the Wisconsin Legislature revising and amending the charter of the city of Oshkosh, that municipal corporation was made capable of suing and being sued in all courts of law and equity. *Laws of Wisconsin*, 1883, *vol.* 2, *p.* 687, *c.* 1, § 1. The same act provided that all moneys, credits and demands of the city should be under the control of the common council, and "be drawn out only upon the order of the mayor and city clerk, duly authorized by the vote of the common council." *Ib. p.* 724, *c.* 7, § 1. It was further provided that "any account or demand against the city, before acted on or paid, the council may require the same to be verified by affidavit, except salaries and amounts previously fixed or determined by law, and any person who shall falsely swear to any such amount or demand shall be deemed guilty of perjury, and shall be punished according to law." *Ib. p.* 726, *c.* 7, § 10.

The Supreme Court of Wisconsin, in its opinion, states that except for the above restrictions upon the payment of money, the city of Oshkosh was, in 1883, subject to be sued upon contract liability like any private person or corporation.

But by the city's amended charter of 1891 certain changes were made, and the question is whether those changes, if applied to the contract of 1883, would impair its obligation. 2 *Laws of Wisconsin*, 1891, *p.* 321, *c.* 59.

The revised charter retained substantially the above provisions in the charter of 1883, and the following, among other, additions, were made:

"§ 4. No action shall be maintained by any person against the city upon any claim or demand until such person shall first have presented his claim or demand to the common council for allowance, and the same shall have been disallowed in whole or in part: *Provided*, That the failure of such common council to pass upon such claim within sixty days after the presentation thereof shall be deemed a disallowance thereof.

"§ 5. The determination by the common council disallowing in whole or in part any claim shall be final and conclusive and a bar to any action in any court founded on such claim, unless an appeal shall be taken from the decision of such common council as in this act provided.

"§ 6. Whenever any claim against the city shall be disallowed in whole or in part by the common council, such person may appeal from the decision of such common council disallowing said claim to the Circuit Court of the county in which the city is situated, by causing a written notice of such appeal to be served on the clerk of the city within twenty days after making the decision disallowing such claim; and by executing a bond to the city in the sum of one hundred and fifty dollars, with two sureties, to be approved by the city attorney and comptroller, conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellant in the Circuit Court. The clerk, in case such appeal is taken, shall make a brief statement of the proceedings had in the case before the common council with its decision thereon and shall transmit the same, together with all the papers in the case, to the clerk of the Circuit [Court] of the county. Such case shall be entered, tried and determined in the same manner as cases originally commenced in such court: *Provided, however*, That whenever an appeal is taken from the allowance made by the common council upon any claim, and the recovery upon such appeal shall not exceed the amount allowed by the common council exclusive of interest upon such allowance, the appellant shall pay the costs of appeal, which shall be deducted from the amount of the recovery; and when the amount of costs exceed the amount recovered, judgment shall be rendered against the appellant for the amount of such excess." *Ib. p.* 412, *c. XXI*, § 6.

It is not alleged in the complaint that the Waterworks Company before commencing this action presented its claims to the common council for allowance.

The company contends that if the above provisions are construed to mean what the Supreme Court of Wisconsin have declared similar provisions in other municipal charters to mean then such burdens and restrictions have been imposed upon the enforcement of its contract with the city of Oshkosh as to impair its obligation. This suggestion renders it necessary to ascertain the import of those decisions.

In *Drinkwine* v. *City of Eau Claire*, 83 *Wis.* 428, 430, it appeared that Drinkwine preferred a claim against the city of Eau Claire, which was disallowed by the common council. He appealed from that action of the council, and executed a bond, which recited that he had appealed to *the Circuit Court of Eau Claire County*, and conditioned for the payment of all costs that should be adjudged against him by *the court aforesaid*, and not generally by *the court*, as prescribed by the statute. It was contended that the bond was insufficient since, in the event of a change of venue in the case, the surety would not be bound by a judgment for costs in the court that actually tried the case. After referring to prior cases in that and in other courts, particularly to *Sharp* v. *Bendell*, 10 *Ill.* 88, in which it had been held that if an appellant failed to comply substantially with the requirements of the statute in relation to the perfecting of appeals the Circuit Court did not acquire jurisdiction of the person of the opposite party or of the subject matter, and should dismiss the appeal, the Supreme Court of Wisconsin said: "The liability of a surety is *strictissimi juris*, and cannot be extended by implication. He has a right to stand on the exact words of his contract. . . . The deviation from the statutory requirement is one of substance. The surety may have been quite willing to enter into the judgment to pay the costs, if the appellant should be defeated on a trial in Eau Claire County, in the city where the alleged cause of action arose, and quite unwilling to undertake for the payment of the costs, in like event, in a trial in a distant county, greatly increased by the travel of witnesses and the costs of subpœnaing them. A similar ruling in *Myres* v. *Parker*, 6 *Ohio St.* 502–504, sustains the conclusion at which we have arrived, that the bond under consideration is not a substantial compliance with the statute." The ruling in the Drinkwine case was reaffirmed in *Oshkosh Waterworks Co.* v. *City of Oshkosh*, 106 *U. S.* 85, and in other cases.

In *Mason* v. *Ashland*, 98 *Wis.* 540–547, it was held that, under the charter of the city of Ashland, the right of appeal from the disallowance of a claim by the common council was perfect at the expiration of sixty days from the filing of the claim with its clerk, and that the claimant "was obliged to exercise it within the twenty days allowed by statute, or be for-

ever barred from thereafter prosecuting his claim in any court"—citing *Fleming* v. *Appleton*, 55 *Wis.* 90, and *Kock* v. *Ashland*, 83 *Wis.* 361.

In *Telford* v. *City of Ashland*, 100 *Wis.* 238, it was adjudged that as the objection that the appeal was not taken within twenty days after the adverse action of the council goes to the jurisdiction of the subject matter, it may be raised for the first time in the appellate court.

In *Segar* v. *City of Ashland*, 101 *Wis.* 515, it was held that under a provision in a city charter to the effect that in case any person presented his claim or demand against the city, which the common council disallowed in whole or in part, the council "shall not again consider or allow such claim," and its failure to act upon a claim within sixty days after being presented was equivalent to a disallowance—the right to appeal therefrom expiring in twenty days after such disallowance.

Accepting these decisions as our guide in determining the meaning and effect of the provisions in the revised charter of Oshkosh, we perceive no reason for holding that the change in remedies made by that charter impair, in the constitutional sense, the obligation of the contract of 1883 between the Waterworks Company and the city.

The requirement that a claim or demand against the city should be presented to the common council and be disallowed, in whole or in part, before the city can be subjected to suit upon it, is a reasonable regulation for the protection of the city against the cost of unnecessary litigation. It does not affect the substance of the creditor's right, without being unreasonably delayed, to institute an action against the city. It only stays his hand until the city has full opportunity to look into his claim before paying or refusing to pay it. Nor does the above regulation unduly obstruct the creditor; for, by it the city is in effect allowed only sixty days for such examination, and the creditor is protected against a vexatious or indefinite delay by the provision that the failure of the council, for sixty days, to pass upon the claim shall be deemed a disallowance thereof, and the creditor may at once appeal to the Circuit Court of the county. In that court the necessary issues can be framed, under the direction of the court, and according to the usual modes of pleading, and the rights of the parties judicially ascertained and enforced.

Equally without merit is the objection to that clause of the revised charter making the disallowance of a claim, in whole or in part, by the council, final and conclusive, unless an appeal be taken to the Circuit Court of the county within a prescribed time. We take it that the purpose of that provision was to protect the public against the dangers attending persistent and frequent applications to the common council after it had once acted and to compel claimants to proceed with promptness while all the facts connected with their demands were fresh in the minds of the members of the council. This is a wholesome regulation, of which no creditor can

justly complain, since the charter enables him, without serious delay, after the disallowance of his claim, to invoke the jurisdiction of a court of general jurisdiction for the enforcement of such claim.

But it is earnestly insisted by the Waterworks Company that the provision requiring an appeal from the disallowance of a claim to be perfected within twenty days thereafter is so unreasonable, in the matter of time, as, by its necessary operation, to impair the obligation of its contracts with the city. We cannot assent to this view. The time within which the creditor must perfect his appeal is undoubtedly short. But it is sufficient for the purpose of enabling him to get his case, with reasonable dispatch, into the Circuit Court and have its judgment as to his claim against the city, with the same right that other litigants have to take the case to the highest court of the State. Here again is disclosed the purpose of the Legislature to bring to a speedy conclusion all disputes as to claims against the city. It surely was competent for the Legislature to effect such an object, and it cannot be said, as matter of law, that a provision requiring the creditor within twenty days after the disallowance of his claim to serve notice of appeal on the city clerk materially affects or obstructs the presentation of his claim to the proper Circuit Court.

Objection is also made to the requirement in the new charter that the appeal bond shall be approved by both the city attorney and comptroller. In support of that objection it is said that one or the other or both of those officers *might* be absent from the city at the time the bond is tendered by the creditor; also, that one or both of them *might* object to the bond when he ought to accept it as sufficient. But these contingencies may never arise. They certainly have not arisen in respect of the claim of the Waterworks Company, for it is not alleged that the company ever presented its claim to the common council for allowance, and consequently had no occasion to tender the city attorney and comptroller an appeal bond. Besides, it is not at all clear that the revised charter requires, as a condition of the right to appeal, that a bond be executed by the creditor within twenty days after the disallowance of his claim by the common council. It does expressly require that the notice of appeal shall be served within that time on the clerk of the city, but no such absolute requirement is made as to the time within which the appeal bond must be executed. It may be that a construction that would defeat the creditor's appeal, because of the absence of the city attorney and comptroller, or either of them, at the time a bond is tendered for their approval, or a refusal to approve a bond that was sufficient, would make the revised charter, in its application to such a case, repugnant to the contract clause of the Constitution. But no such case is now presented, and no such question as that suggested need be now decided. It should not be assumed that the right of appeal will be lost where the creditor has done all that was re-

quired in order to perfect his appeal. As the Waterworks Company does not allege that it presented its claim to the common council for allowance, it is not in a position to ask a judicial determination of a question that cannot arise in this case.

Another objection remains to be noticed. It is founded on the decision in *Drinkwine* v. *City of Eau Claire*, above cited, in which it was held that the appeal bond provided in the charter of Eau Claire must relate to costs as adjudged by the Circuit Court, and not by the Circuit Court of any named county. We have seen what were the reasons that governed the Supreme Court of Wisconsin in so interpreting a provision similar to the one here in question in the revised charter of the city of Oshkosh. If that interpretation was, as suggested, too technical it would not follow that the charter thus construed would impair the obligation of contracts. It would be extraordinary if this court should hold the new remedies and modes of procedure provided by the revised charter to be illegal because of the possibility that a creditor might, by mistake or carelessness, execute a bond not conditioned, as required by that charter, for the payment of the costs adjudged by the Circuit Court, generally, but by a named Circuit Court.

As to the contention that the obligation of the contract of August 31st 1891 was impaired by the revised charter, it is sufficient to say that that charter went into operation March 23d 1891. The contract of 1891 was a new contract, it dependent of that of 1883, and the Waterworks Company could not therefore say that its obligation was impaired by a statute in force at the time the contract was made. The contract clause of the Constitution of the United States has reference only to a statute of a State enacted after the making of the contract whose obligation is alleged to have been impaired. *Lehigh Water Co.* v. *Easton*, 121 *U. S.* 388, 391; *Pinney* v. *Nelson*, 183 *U. S.* 144, 147; *New Orleans Waterworks Co.* v. *Louisiana*, 185 *U. S.* 336, 351. If, however, the agreement of 1891 had such connection with that of 1883 that they may be regarded as one agreement, then what has been said as to the application of the revised charter to the contract of 1883 applies, in all respects, to that of 1891. The obligation of neither contract was impaired by the charter of 1891.

We have noticed all the points that require consideration, and adjudge, therefore, that the changes made by the revised charter of Oshkosh in respect of remedies for the enforcement of claims against that city provided for its creditors a substantial and adequate remedy, and therefore did not impair the obligation of contracts with that municipal corporation.

The judgment of the Supreme Court of Wisconsin must be affirmed.

It is so ordered.